CENTRAL PUGET SOUND
GROWTH MANAGEMENT HEARINGS BOARD
STATE OF WASHINGTON

1000 FRIENDS OF WASHINGTON, STILLAGUAMISH FLOOD CONTROL DISTRICT, AGRICULTURE FOR TOMORROW, PILCHUCK AUDUBON SOCIETY; and THE DIRECTOR OF THE STATE OF WASHINGTON DEPARTMENT OF COMMUNITY, TRADE AND ECONOMIC DEVELOPMENT, Petitioners, v. SNOHOMISH COUNTY, Respondent, and DWAYNE LANE, Intervenor.	)	**Case No. 03-3-0019c** **CORRECTED FINAL DECISION AND ORDER**

I. SYNOPSIS

In October of 2003, five organizations[1] filed Petitions for Review with the Growth Management Hearings Board alleging that Snohomish County Ordinance No. 03-063 was not guided by the goals of the Growth Management Act and did not comply with the requirements of the GMA. Ordinance No. 03-063 made three changes to the County's comprehensive land use plans and development regulations relative to a 110.5 acre unincorporated area referred to as Island Crossing: (1) it changed the land use

[1] The organizations challenging the County's action included 1000 Friends of Washington, the Washington State Department of Community, Trade and Economic Development, and the Stillaguamish Flood Control District.

designations for 75.5 acres of "Riverway Commercial Farmland" and 35.5 acres of "Rural Freeway Service" to "Urban Commercial;" (2) it rezoned these lands from "Rural Freeway Service" and "Agriculture-10 Acres" to "General Commercial," and (3) it revised the urban growth area boundary to include the entirety of the Island Crossing area within the urban growth area for the City of Arlington. Joining Snohomish County in defending its action was Intervenor Dwayne Lane, the owner of property within the Island Crossing area.

The Board agrees with the Petitioners that Snohomish County Ordinance No. 03-063 **does not comply** with the goals and requirements of the GMA, specifically its provisions regarding conservation of agricultural resource lands and the provisions regarding the expansion of urban growth areas. Because the Board finds these two independent reasons for remanding Ordinance No. 03-063 to the County, it concludes that it need not reach the question of whether the County's action also violated the GMA's provisions regarding protection of critical areas.

The Board directs Snohomish County to take legislative action to bring Ordinance No. 03-063 into compliance with the goals and requirements of the GMA by **May 24, 2004**. The Board further finds that the continued validity of Ordinance No. 03-063 during the period of remand would substantially interfere with fulfillment with the goals of the Act regarding conservation of agricultural land, directing development to urban areas and reducing sprawl. Therefore, the Board enters a **Determination of Invalidity** with respect to the following portions of Ordinance No. 03-063:

- The portion that expanded the Arlington urban growth area by 110.5 acres to include the Island Crossing area.
- The portion that replaced the 75.5 acre area of Riverway Commercial Farmland designation with an Urban Commercial designation
- The portion that rezoned the 75.5 acres of A-10 to General Commercial (GC)
- The portion that replaced the 35.5 acre area of Rural Freeway Service with an Urban Commercial designation
- The portion that rezoned the 35.5 acres of Rural Freeway Service (RFS) to General Commercial

The Board notes that Section 6 Ordinance 03-063 explicitly provides that "if any provision of this ordinance is held invalid or unconstitutional, then the provision in effect prior to the effective date of this ordinance shall be in full force and effect for that individual provision as if this ordinance had never been adopted."

II. BACKGROUND

A. HISTORY OF GMA LITIGATION RE: ISLAND CROSSING

1. Among the seventy issues challenging the GMA compliance of Snohomish County's first comprehensive plan in 1996 was an allegation by Pilchuck Audubon Society that the County had violated the agricultural resource lands provisions of the Growth

Management Act in removing from resource lands designation lands in the Island Crossing Area. The Board upheld the County's action. CPSGMHB, *Sky Valley, et al., v. Snohomish County*, Final Decision and Order, Case No. 96-3-0068c, April 15, 1996.

2. On November 19, 1997, Snohomish County Superior Court, in reviewing the Board's decision in *Sky Valley v. Snohomish County*, issued a "Judgment Affirming in Part and Remanding in Part," Superior Court Case No. 96-2-03675-5.

3. In an oral decision incorporated by the Court into the Judgment Affirming in Part and Remanding in Part, the Superior Court stated:

> Evidence and arguments supporting de-designation were presented by [the City of Arlington] . . . focused almost exclusively on issues relating to the City of Arlington's economic growth and well-being, and not on Growth Management Act Criteria. . . .An isolated special purpose freeway service node does not constitute generalized urban growth . . . What happened to the fundamental axiom of the Growth Management Act that "the land speaks first"? Where does the Act state that the economic welfare of cities speaks first? Where does the evidence submitted by Arlington even reference the agricultural productivity or the floodplain status of the lands which are not proposed for automobile dealerships? Freeways are no longer longtitudinal strips of urban opportunity. Agricultural lands must be conserved as a first priority, and urban centers must be compact, separate and distinct features of the remaining part of the landscape.

Id. Transcript of Proceedings, Court's Oral Ruling, at 14-18.

4. The Superior Court remanded the *Sky Valley* matter to the Board, finding no substantial evidence to support the removal of the agricultural designation. PDS Report, at 4.

5. Subsequent to the Superior Court remand, the Snohomish County Planning Commission and County Council reconsidered the land use designations for Island Crossing in 1998 and redesignated the agricultural areas as agricultural and redesignated the commercial area as Rural Freeway Service, and removed Island Crossing from the Arlington UGA.
Id.

6. Dwayne Lane, the owner of 15 acres of land bordering Interstate 5 in Island Crossing, challenged the County's designation of Island Crossing as agricultural resource land and filed a petition for review with the Growth Management Hearings Board. The Board rejected Lane's appeal. CPSGMHB Case No. 98-3-0033c, *Lane, et al., v. Snohomish County*, Order Granting Motion to Dismiss [Lane]. Jan. 20, 1999.

7. Snohomish County Superior Court affirmed the Board's January 20, 1999 Order, after which Lane appealed to the Court of Appeals. *Lane v. Central Puget Sound Growth Management Hearings Board*, 2001 WL 244384 (Wash. App. Div. I, Mar. 12, 2001).

8. The Court of Appeals described the Island Crossing area as follows:

> Island Crossing is composed of prime agricultural soils and has been described as having agricultural value of primary significance. Except for the County's 1995 dedesignation of Island Crossing as agricultural land, Island Crossing has been designated and zoned agricultural since 1978. Thus, the record supports a finding that Island Crossing is capable of being used for agricultural production. *See City of Redmond v. Cent. Puget Sound Growth Mgmt. Hrgs. Bd.*, 136 Wn.2d 38, 53, 959 P.2d 1091 (1998).
>
> Although Island Crossing borders the interchange of Interstate 5 and State Road 530, it is separated from Arlington by farmland. Indeed, the record contains evidence to indicate that most of the land in Island Crossing is being actively farmed, except a small area devote to freeway services. Thus, the record indicates that the land is actually used for agricultural production. *See City of Redmond*, 136 Wn.2d at 53. The only urban development permits issued for Island Crossing are for the area that serves the freeway. Further, the substantial shoreline development permit for sewer service in the freeway area explicitly 'prohibits any service tie-ins outside the Freeway Service Area.' Thus, adequate public facilities and services do not currently exist.
>
> *Id.*

B. PROCEDURAL HISTORY OF CASE NO. 03-3-0019c

On October 23, 2003, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from 1000 Friends of Washington, Stillaguamish Flood Control District (**Stillaguamish**), Agriculture for Tomorrow, and Pilchuck Audubon Society (collectively, **Petitioners** or **1000 Friends**) and "Request for Expedited Review." Petitioners challenge the adoption by Snohomish County (the **County** or **Snohomish**) of Amended Ordinance No. 03-063.

The basis for the challenge is alleged noncompliance with various provisions of the Growth Management Act (**GMA or Act**). The matter was assigned Case No. 03-3-0019 and is hereafter referred to as *1000 Friends, et al., v. Snohomish County.* Board member Joseph W. Tovar is the Presiding Officer for this matter.

On October 28, 2003, the Board issued the "Notice of Hearing" in this matter.

On November 5, 2003, the Board received "Snohomish County's Response to Petitioners' Request for Expedited Review." Also on this date, the Board received from Dwayne Lane a "Motion for Status as Intervenor" (the **Dwayne Lane Motion to Intervene**) in Case No. 03-3-0019 and a draft "Order Granting Motion for Status as Intervenor." Also on this date, the Board received a PFR from "The Director of the State of Washington Department of Community, Trade, and Economic Development" (the **DCTED II PFR**) challenging the adoption of Snohomish County Ordinances Nos. 03-063 and 03-104, together with a "Motion to Consolidate" (the **DCTED Motion to Consolidate**) with Cases Nos. 03-3-0017 and 03-3-0019. The DCTED II PFR case was assigned Case No. 03-3-0020 and the case was titled *CTED v. Snohomish County [II]*.

On November 6, 2003, beginning at 10:00 a.m., the Board conducted the prehearing conference in the training room on the 24th floor of the Bank of California Building, 900 Fourth Avenue in Seattle. At the prehearing conference, the presiding officer orally granted the portion of the DCTED Motion to Consolidate that includes issues addressed to Snohomish Ordinance No. 03-063. He indicated that the legal issues addressed to Snohomish Ordinance No. 104 would not be consolidated with Case No. 03-3-0019, but would be referred to Mr. McGuire, the presiding officer in Case No. 03-3-0017. The presiding officer also orally granted the motion by Dwayne Lane to intervene in the consolidated 1000 Friends and DCTED challenges to Snohomish Ordinance No. 03-063.

On November 10, 2003, the Board received "Snohomish County-Camano Association of Realtors and Master Builders Association of King and Snohomish Counties' Joint Opposition to CTED's Motion to Consolidate." The caption of this pleading listed both Case No. 03-3-0017 (CTED I) and Case No. 03-3-0020 (CTED II).

On November 12, 2003, the Central Puget Sound Growth Management Hearings Board (the **Board**) issued "Prehearing Order, Order Partially Granting Motion for Consolidation, and Order Granting Motion for Intervention" (the **PHO**) in the above captioned matter. The PHO set the Final Schedule for the submittal of motions and briefs. PHO, at 4-5. Later on this same date, the Board received from Petitioner 1000 Friends a letter (the **1000 Friends letter**) attached to which were: (1) a City of Arlington Development Services "City Council Agenda Bill" with a Council Meeting Date of September 17, 2003 and the subject heading caption "Consideration of Intention of Annexation 10% Petition for Island Crossing Annexation (File No. A-03-068)" and (2) a memorandum, dated September 7, 2003, from Cliff Strong, Arlington Planning Manager to the Mayor and City Council.

On November 13, 2003, the Board received from the County a letter (the **County letter**) responding to the 1000 Friends letter.

On November 14, 2003, the Board received "Snohomish County's Index to the Record" (the **County's Index**). Later on this same date, the presiding officer directed Susannah Karlsson, the Board's Administrative Officer, to contact the parties to the case for the purpose of setting up a telephone conference call to hear oral argument regarding the

1000 Friends letter and the County letter on Tuesday, November 18**,** 2003 commencing at 9 a.m.

On November 18, 2003, the Board conducted a telephonic conference call to hear argument regarding the 1000 Friends letter and the County letter. Participating for the Board were Bruce C. Laing and Joseph W. Tovar, presiding officer. Participating for 1000 Friends was John T. Zilavy, for the County was Andrew S. Lane, for Stillaguamish were Henry Lippek and Ashley E. Evans, for Intervenor Dwayne Lane was Todd C. Nichols, and for the Washington State Department of Community, Trade and Economic Development was Alan D. Copsey.

On November 24, 2003, the Board issued "Order Granting Motion to Supplement the Record" (the **First Order on Motions**). The First Order Granting Supplementation admitted to the record before the Board two supplemental exhibits and assigned them exhibit numbers Supp. Ex. 1 and Supp. Ex. 2.

On December 4, 2003, the Board received "1000 Friends' Motion to Correct the Record and Index of Record" (the **1000 Friends Motion**) with proposed supplemental exhibits A, B, and C.

On December 5, 2003, the Board received "Flood Control District's Motion to Correct the Record and Index of the Record," (the **Stillaguamish Motion**) with proposed supplemental exhibits A and B.

On December 12, 2003, the Board received "Snohomish County's Response to Motions to Supplement the Record" (the **County Response**) with Attachments A, B and C. On this same date the Board received "Dwayne Lane's Memorandum in Opposition to Correct the Record and Index of Record" (the **Lane Memorandum**) together with the "Declaration of Dwayne Lane Re: Motions to Correct or Supplement the Record" (the **Lane Declaration**).

On December 18, 2003, the Board received "Petitioners' Reply to Motion to Correct the Record and Index of Record" (the **1000 Friends Reply**).

On December 19, 2003, the Board received "Flood District's Reply to Dwayne Lane and Snohomish County's Responses to Motion to Correct the Record and Index of Record" (the **Flood District Reply**).

On January 2, 2004, the Board issued "Second Order on Motions" (the **Second Order on Motions**).

On January 9, 2004, the Board received the "Petitioner Stillaguamish Flood Control District's Prehearing Brief" (the **Flood District PHB**) "1000 Friends of Washington Opening Brief" (the **1000 Friends' Opening Brief**); and "CTED's Opening Brief" (the **CTED Opening Brief**).

On January 23, 2004, the Board received "Snohomish County's Response Brief" (the **County Response**) and "Intervenor Lane's Hearing Response Memorandum" (the **Lane Response**) and "Intervenor Lane's Motion to Supplement the Record" (the **Lane January 23, 2004 Motion to Supplement**).

On January 29, 2004, the Board received "Flood District's Reply Brief" (the **Flood District Reply**), and "CTED's Reply Brief" (the **CTED Reply**).

On January 30, 2004, the Board received "1000 Friends of Washington, Agriculture for Tomorrow, and Pilchuck Audubon Society Reply Brief" (the **1000 Friends Reply**).

The Board conducted the Hearing on the Merits (the **HOM**) in this matter on February 2, 2004 in the conference room adjacent to the Board's office, Suite 2470, 900 Fourth Avenue in Seattle. Present for the Board were Edward G. McGuire, Bruce C. Laing, and Joseph W. Tovar, presiding officer. Also present were the Board's legal externs Ketil Freeman and Lara Heisler. Court reporting services were provided by Scott Kindle of Mills and Lessard, Seattle. The parties were represented as follows: for 1000 Friends was John T. Zilavy; for Stillaguamish Flood Control District were Henry Lippek and Ashley Evans; for CTED was Alan D. Copsey; for the County was Andrew S. Lane; and for Intervenor Dwayne Lane was Todd C. Nichols. No witnesses testified. At the conclusion of the HOM, the presiding officer directed that a transcript (the **HOM Transcript**) be prepared.

On February 11, 2004, the Board received a letter from counsel for the County indicating that "Snohomish County will not be submitting a post-hearing rebuttal to 1000 Friends' late reply brief."

On February 13, 2004, the Board received "Intervenor Lane's Surrebuttal Memorandum" (the **Lane Surrebuttal**).

On March 18, 2004, the Board received "1000 Friends of Washington, Agriculture for Tomorrow, and Pilchuck Audubon Society Motion to Supplement the Record" (the **1000 Friends March 18, 2004 Motion to Supplement**). Later on this same date, the Board received "Respondent Snohomish County's Response to 1000 Friends' Motion to Supplement the Record" (the **County Response to the 1000 Friends March 18, 2004 Motion to Supplement**).

On March 19, 2004, the presiding officer directed the Board's Administrative Officer Susannah Karlsson to contact the parties to ask if they wished to file any response to the 1000 Friends March 18, 2004 Motion to Supplement. She made telephone contact with all parties. Later on this same date, the Board received "Intervenor Dwayne Lane's Response to 1000 Friends' Motion to Supplement the Record" (the **Lane Response to the 1000 Friends March 18, 2004 Motion to Supplement**) and correspondence from counsel for the Stillaguamish Flood Control District (the **Flood District Letter**).

III. FINDINGS OF FACT

1. The Snohomish County Council adopted Ordinance No. 03-063 on September 10, 2003. 1000 Friends PFR, Attachment 1.

2. The caption of Ordinance No. 03-063 reads: "REVISING THE EXISTING URBAN GROWTH AREA FOR THE CITY OF ARLINGTON; ADOPTING MAP AMENDMENTS TO THE GROWTH MANAGEMENT ACT COMPREHENSIVE PLAN; AND ADOPTING COUNTY-INITIATED AREA-WIDE REZONES PURSUANT TO CHAPTER 30.74 SCC; AND AMENDING AMENDED ORDINANCE 94-125, ORDINANCE 94-120, AND EMERGENCY ORDINANCE 01-047. *Id.*

3. Among the County Council's findings of fact and conclusions listed in Section 1 of Ordinance No. 03-063 are the following:

> B. 6. Ragnar soils are the best soils for production of commercial crops and there are no Ragnar soils at Island Crossing. The Island Crossing area consists primarily of Puget soils that are adequate for hay, green chop and pasture, but are not suitable for more valuable crops like berries and corn. The Puget soils are considered "prime" only when artificially drained, which the land at the site is not, and even when drained the Puget series is considered low productivity.
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> B.7. Farming is no longer financially viable at Island Crossing. Busy highways, high assessed value, small parcel size and safety issues eliminate the viability of the Island Crossing interchange site as agricultural land.
>
> B.8. Snohomish County is growing rapidly and it is inevitable that sits like Island Crossing will be converted from agricultural uses to commercial uses.
>
> S. Approval of the Island Crossing Interchange Docket Proposal is not precedent for redesignation of Agricultural land in the Stillaguamish Valley. This proposal is approved entirely on its own merits. These include: (1) This proposal is supported by the Snohomish County Planning Commission. (2) Bringing this land into the Arlington Urban Growth Area is fully supported by the City of Arlington. (3) This proposal is supported by the Stillaguamish Tribe. (4) This land is located at an I-5 interchange between an interstate highway and a state highway, and is uniquely located for commercial needs of the area. (5) This land has unique access to utilities. Redesignation of adjacent properties to the east will not occur because utilities are unavailable to the east.

T. The land contained within the Island Crossing Interchange Docket Proposal is not agricultural land of long term commercial significance. . . At the public hearing, the testimony of Mrs. Robert Winter (Exh. 111) was very persuasive on this point. Since the mid-1950's, she and her husband had a dairy farm in the very location of the Island Crossing Interchange Docket Proposal site. Locating and then expanding I-5 put them out of the dairy business. They soon discovered that crops generated less revenue than the property taxes. The Winters sold the land because the land could not be profitably farmed.

U. The Island Crossing Interchange Docket Proposal site has episodically flooded in the past and will continue to episodically flood in the future, whether or not the proposal is approved, and whether or not the site is developed. The relevant question is not whether the proposal site experiences floods, but rather does the site experience significant adverse flood impacts which cannot be reasonably mitigated. The Draft Supplemental Environmental Impact Statement (Exh. 22) clearly states, at p. 2-24: "Assuming effective implementation of applicable regulations and recommended mitigation measures, no significant unavoidable adverse surface water quantity or quality impacts would be anticipated associated with the future development of the site." *Id.*

4. Section 6 of Ordinance No. 03-063 provides:

> Severability. If any provision of this ordinance is held invalid or unconstitutional, such invalidity or unconstitutionality shall not affect the validity or constitutionality of the remainder of this ordinance. Provided, however, that if any provision of this ordinance is held invalid or unconstitutional, then the provision in effect prior to the effective date of this ordinance shall be in full force and effect for that individual provision as if this ordinance had never been adopted.

Id.

5. Snohomish County is 2,089 square miles. Washington State Data Book for 2003, Office of Financial Management, at 236.

6. The Snohomish County General Policy Plan designates approximately 3% of the County's total land area, or 60,000 acres, as GMA agricultural resource lands. http://www.co.snohomish.wa.us/PDS/900-Planning/Resource/default.asp

7. With the exception of the cities of Stanwood and Arlington, the floodplain of the main fork of the Stillaguamish River is designated on the County's Future Land Use Map as Agricultural Resource Land. Snohomish County General Policy Plan, FLUM, online at http://www.co.snohomish.wa.us/pds/905-GIS/maps/flu/flu117.pdf .

8. The Island Crossing area is located within the floodplain of the Stillaguamish River**.** Planning and Development Services (**PDS**) Report, at 10.

9. The Stillaguamish River basin suffers from damaging floods on average every three to five years according to the Federal Emergency Management Agency. PDS Report, at 11.

10. The 110.5 acre area subject to Ordinance No. 03-063 is configured as a multi-sided polygon with two roughly mile-long sides that follow north-south right-of-way lines, two smaller but *parallel* east-west sides that do not follow right-of-way lines, and a number of other smaller sides that follow jogs in right-of-way or property lines. DEIS, Figure 1-2, scale map of "Proposed Comprehensive Plan Amendment – Dwayne Lane."

11. The two long sides of the 110.5 acre shape are (a) the western side which coincides with the western edge of the Interstate 5 right-of way for approximately 5,900 linear feet; and (b) the eastern side of approximately 5,000 linear feet, of which roughly the southerly 4,300 feet coincide with the eastern edge of the Smokey Point Boulevard right-of-way. The two parallel sides of this shape are (a) the northerly edge which is approximately 2,700 linear feet and coincides with the northern edge of parcels which front onto S.R. 530; and (b) the southern side, which is roughly 450 linear feet long, and lies entirely within public right-of-way. *Id.*

12. The southerly 700 feet of the 110.5 acre shape (*i.e.*, that portion which lies south of 200th Street NE, if extended) is entirely within either Interstate 5 right-of-way or Smokey Point Boulevard right-of-way. *Id.*

13. The City of Arlington city limits abut the southern edge of the 110.5 acre shape.

14. The closest point of contact between Arlington's city limits and private property within the 110.5 acre shape is approximately 700 feet. *Id.*

15. Prior to the adoption of Ordinance No. 03-063, the 35.5 acre northwest portion of the 110.5 acre area was designated on the County's Future Land Use Map (**FLUM**) as Rural Freeway Service and zoned Rural Freeway Service (RFS). DSEIS, at i.

16. Prior to the adoption of Ordinance No. 03-063, the 75.5 acre eastern portion of the 110.5 acre area was designated on the FLUM as Riverway Commercial Farmland and zoned Agricultural-10. *Id.*

17. The Island Crossing Area is designated floodway fringe by the County's flood hazard regulations. PDS Report, at 14.

18. In letters dated February 21, 2003 and February 26, 2003, the Snohomish County Agricultural Advisory Board recommended that the County not remove the agricultural land use designations at Island Crossing. Index of Record 25.

19. The Agricultural Advisory Board stated its reasoning as:

    1) The land lies in the Stillaguamish floodplain, at or below the 100-year flood level. Photographs demonstrate it is completely inundated

during major flood events, much of it under several feet of water. It is bisected by a floodway (South Slough) and bordered by a 303d-listed, year-round salmon stream (Portage creek), into which the area drains.

2) The land is comprised of prime agricultural soil, well drained and highly fertile. Currently and historically farmed, it has long been identified by the County as "agricultural land of primary importance."

3) All adjacent lands, except a small, freeway service zone, are predominantly agricultural in use and indisputably non-urban in character. The existing "development pattern," cited as a hindrance to farming in the request itself, would be dwarfed by the one it proposes, with proportionate adverse impact.

Id.

IV. STANDARD OF REVIEW/BURDEN OF PROOF/DEFERENCE

A. Board Review of Local Government Decisions

Petitioners challenge the County's adoption of Ordinance No. 03-063 alleging that the Ordinance does not comply with the goals and requirements of the Growth Management Act. Pursuant to RCW 36.70A.320(1), Ordinance No. 03-063, is presumed valid upon adoption by the County. Petitioners bear the **burden of proof** of overcoming the County's **presumption of validity** by presenting evidence and argument that demonstrates clear error.

The Board is directed by RCW 36.70A.320(3) to review the challenged action using the **"clearly erroneous" standard of review**. The Board "shall find compliance unless it determines that the actions taken by [a city or county] are clearly erroneous in view of the entire record before the board and in light of the goals and requirements of [the GMA]." For the Board to find the County's actions clearly erroneous, the Board must be "left with the firm and definite conviction that a mistake has been made." *Dep't of Ecology v. PUD 1*, 121 Wn.2d 179, 201 (1993).

Pursuant to RCW 36.70A.3201, the Board will grant **deference** to the County in how it plans for growth, provided that its policy choices are consistent with the goals and requirements of the GMA. In 2000, the State Supreme Court reviewed RCW 36.70A.3201 and clarified that, "Local discretion is bounded . . . by the goals and requirements of the GMA." *King County v. Central Puget Sound Growth Management Hearing Board* (***King County***), 142 Wn.2d 543, 561, 14 P.3d 133, 142 (2000).

In 2001, Division II of the Court of Appeals further clarified, "Consistent with *King County*, and notwithstanding the 'deference' language of RCW 36.70A.3201, the Board acts properly when it foregoes deference to a . . . plan that is not 'consistent with the requirements and goals of the GMA." *Cooper Point Association v. Thurston County (**Cooper Point**)*, No. 26425-1-II, 108 Wn. App. 429, 31 P.3d 28 (Wn.App. Div. II, 2001).

In 2002, the Supreme Court upheld the *Cooper Point* court. *Thurston County v. Western Washington Growth Management Hearing Board*, Docket No. 71746-0, November 21, 2002, at 7.

B. Judicial Review of Board Decisions

Any party aggrieved by a final decision by a growth management hearings board may appeal the decision to superior court as provided in RCW 34.05.514 or 36.01.050 within thirty days of the final order of the Board. RCW 36.70A.300(5).

RCW 36.70A.260(1) requires that board members be "qualified by experience or training in matters pertaining to land use planning." The Board has been endowed by the legislature with quasi-judicial functions due to its expertise in land use planning.[2] Accordingly, under the Administrative Procedures Act, a reviewing court accords substantial weight to this agency's interpretation of the law. The Supreme Court, in *Cooper Point*, specifically affirmed this standard of review of a Growth Management Hearings Board decision:

> Although we review questions of law *de novo*, we give substantial weight to the Board's interpretation of the statute it administers. *See Redmond*, 136 Wn.2d at 46. Indeed "[I]t is well settled that deference [to the Board] is appropriate where an administrative agency's construction of statutes is within the agency's field of expertise . . .

Id.

V. MISCELLANEOUS MOTIONS

A. MOTION TO STRIKE PORTION OF FLOOD DISTRICT BRIEF

At the hearing on the merits, the presiding officer orally granted the County Motion to Strike a portion of the Flood District PHB. Transcript, at 5-7. The County Motion to Strike a Portion of the Flood District Brief is **granted**. The Board will not consider the portions of the Flood District PHB from line 18 on page 24 through line 5 on page 27.

B. MOTION TO STRIKE 1000 FRIENDS REPLY BRIEF

At the hearing on the merits, the presiding officer orally denied the Motion to Strike 1000 Friends Reply Brief; however, he provided the County and Intervenor with an opportunity to file a post-hearing brief responsive to the 1000 Friends Reply Brief. Transcript, at 8-15. The Motion to Strike 1000 Friends Reply Brief is **denied.**

[2] The Board members possess the expertise required by RCW 36.70A.260(1). Vitae for Central Puget Sound Board members are posted on the Board's website at www.gmhb.wa.gov/central/index.html.

C. LANE JANUARY 23, 2004 MOTION TO SUPPLEMENT

In the Second Order on Motions, which admitted certain supplemental exhibits by Petitioners, the Board stated that Intervenor lane would be allowed to submit rebuttal evidence. Second Order on Motions, at 9. Attached to Intervenor Lane's January 23, 2004 Motion to Supplement the Record were three proposed supplemental exhibits: "A" which consists of a series of date and time stamped photographs of Island Crossing properties showing its status throughout the day of October 21, 2004; Exhibit B which is a map labeled "Island Crossing Annexation Exhibit" which identifies the location and direction of a photo which is attached as proposed Exhibit C. Petitioner Lane presents argument addressed to the criteria governing the admission of supplemental evidence. Intervenor Lane Motion to Supplement the Record, at 2.

The Board finds that proposed supplemental exhibits "A," "B," and "C' may be of assistance in reaching a decision regarding aspects of the present matter, therefore Intervenor's proposed exhibits are **admitted** as Supplemental Exhibits 5, 6, and 7, respectively.

D. 1000 FRIENDS MARCH 18, 2004 MOTION TO SUPPLEMENT

The 1000 Friends March 18, 2004 Motion to Supplement the record before the Board asks the Board to admit two proposed exhibits. The first is a letter dated March 4, 2004 from the Clerk of the Washington State Boundary Review Board for Snohomish County, the second is an agenda for a City of Arlington special meeting on March 23, 2004. The March 19, 2004 letter from counsel for the Flood Control District supports the 1000 Friends Motion.

Respondent Snohomish County objects to the motion to supplement with these two proposed exhibits. The County argues "Petitioner's motion should be denied outright, because petitioner has failed to follow the Board's rules. 'No written motion may be filed after the date specified in the [prehearing] order without written permission of the board or presiding officer.'" County Response to the 1000 Friends March 18, 2004 Motion to Supplement, at 2, quoting WAC 242-02-532(2). The County also argues that the proposed supplemental evidence will not be of substantial assistance to the Board and points out that Petitioner made no attempt to relate these items to any issue before the Board. *Id.*, at 3. Intervenor Lane agrees with the County's arguments. Lane Response to the 1000 Friends March 18, 2004 Motion to Supplement, at 1.

The Board agrees with the County and Intervenor that Petitioner 1000 Friends failed to comply with the provisions of the Board's Rules and the Prehearing Order by submitting a Motion to Supplement without first submitting a written request for leave to file such pleading. Pursuant to the provisions of WAC 242-02-532(2), the 1000 Friends March 18, 2004 Motion to Supplement is **denied**.

VI. BOARD JURISDICTION AND PREFATORY NOTE

A. BOARD JURISDICTION

The Board finds that Petitioners' PFRs were timely filed, pursuant to RCW 36.70A.290(2); all three Petitioners have standing to appear before the Board, pursuant to RCW 36.70A.280(2); and the Board has subject matter jurisdiction over the challenged Ordinance, pursuant to RCW 36.70A.280(1)(a).

B. PREFATORY NOTE

The Board has organized its discussion and analysis of the five legal issues as follows: first, the Board addresses the allegations regarding the County's redesignation of agricultural resource lands (Legal Issue No. 2); then allegations regarding expansion of the Urban Growth Area (Legal Issues Nos. 1 and 4); then allegations regarding Critical Areas (Legal Issue No. 5). Although the parties briefed the question of invalidity as a legal issue (Legal Issue No. 3), it is addressed in Section VIII titled "Invalidity."

VII. LEGAL ISSUES

A. REDESIGNATION OF AGRICULTURAL RESOURCE LAND

Legal Issue No. 2

Does the Snohomish County adoption of Amended Ordinance No. 03-063, redesignating 110.5 acres from Riverway Commercial Farmland and Rural Freeway Service to Urban Commercial, fail to comply with RCW 36.70A.020(2) and (8) (planning goals to reduce sprawl and conserve natural resource lands), RCW 36.70A.040 (local governments must adopt development regulations that preserve agricultural lands), RCW 36.70A.050 (classification of agricultural lands), and RCW 36.70A.060 (conservation of agricultural lands), and RCW 36.70A.170 (designation of agricultural lands) when this redesignation lacks justification in the record and fails to enhance, protect or conserve agricultural lands of long term commercial significance as required by the Growth Management Act?

1. Applicable Law

A. Statutory Provisions

RCW 36.70A.020 provides in relevant part:

> The following goals are adopted to guide the development and adoption of comprehensive plans and development regulations of those counties and cities that are required or choose to plan under RCW 36.70A.040. The following goals are not listed in order of priority and shall be used exclusively for the purpose of guiding the development of comprehensive plans and development regulations:

(2) Reduce sprawl. Reduce the inappropriate conversion of undeveloped land into sprawling, low-density development.

. . . .

(8) Natural resource industries. Maintain and enhance natural resource-based industries, including productive timber, agricultural, and fisheries industries. Encourage the conservation of productive forest lands and productive agricultural lands, and discourage incompatible uses.

RCW 36.70A.040 provides in relevant part:

(1) Each county that has both a population of fifty thousand or more . . . shall conform with all of the requirements of this chapter.

. . . .

(3) Any county or city that is initially required to conform with all of the requirements of this chapter under subsection (1) of this section shall take actions under this chapter as follows: (a) The county legislative authority shall adopt a county-wide planning policy under RCW 36.70A.210; (b) the county and each city located within the county shall designate critical areas, agricultural lands, forest lands, and mineral resource lands, and adopt development regulations conserving these designated agricultural lands, forest lands, and mineral resource lands and protecting these designated critical areas, under RCW 36.70A.170 and 36.70A.060; (c) the county shall designate and take other actions related to urban growth areas under RCW 36.70A.110; (d) if the county has a population of fifty thousand or more, the county and each city located within the county shall adopt a comprehensive plan under this chapter and development regulations that are consistent with and implement the comprehensive plan on or before July 1, 1994, . . .

Emphasis added.

RCW 36.70A.050 provides in relevant part:

(1) Subject to the definitions provided in RCW 36.70A.030, the department shall adopt guidelines, under chapter 34.05 RCW, no later than September 1, 1990, to guide the classification of: (a) Agricultural lands; (b) forest lands; (c) mineral resource lands; and (d) critical areas. The department shall consult with the department of agriculture regarding guidelines for agricultural lands, the department of natural resources regarding forest lands and mineral resource lands, and the department of ecology regarding critical areas.

. . . .

(3) The guidelines under subsection (1) of this section shall be minimum guidelines that apply to all jurisdictions, but also shall allow for regional differences that exist in Washington state. The intent of these guidelines is

> to assist counties and cities in designating the classification of agricultural lands, forest lands, mineral resource lands, and critical areas under RCW 36.70A.170.

Emphasis added.

RCW 36.70A.060 provides in relevant part:

> (1) Each county that is required or chooses to plan under RCW 36.70A.040, and each city within such county, shall adopt development regulations on or before September 1, 1991, to assure the conservation of agricultural, forest, and mineral resource lands designated under RCW 36.70A.170. . . .

Emphasis added.

RCW 36.70A.170 provides in relevant part:

> (1) On or before September 1, 1991, each county, and each city, shall designate where appropriate:
>
> (a) Agricultural lands that are not already characterized by urban growth and that have long-term significance for commercial production of food or other agricultural products;

Emphasis added.

"Long term commercial significance" is defined as "the growing capacity, productivity, and soil composition of the land for long-term commercial production, in consideration with the land's proximity to population areas, and the possibility of more intense uses of the land." RCW 36.70A.030(10).

B. WAC 365-190-050

The Department of Community, Trade, and Economic Development was directed by RCW 36.70A.050 to adopt guidelines to guide the classification of agricultural lands. These provide:

> (1) In classifying agricultural lands of long-term significance for the production of food or other agricultural products, counties and cities shall use the land-capability classification system of the United States Department of Agriculture Soil Conservation Service [**SCS**] as defined in Agricultural Handbook No. 210. These eight classes are incorporated by the United States Department of Agriculture [**USDA**] into map units described in published soil surveys. These categories incorporate consideration of the growing capacity, productivity and soil composition of the land. Counties and cities shall also consider

the combined effects of proximity to population areas and the possibility of more intense uses of the land as indicated by:

a. The availability of public facilities;
b. Tax status;
c. The availability of public services;
d. Relationship or proximity to urban growth areas;
e. Predominant parcel size;
f. Land use settlement patterns and their compatibility with agricultural practices;
g. Intensity of nearby land uses;
h. History of land development permits issued nearby;
i. Land values under alternative uses; and
j. Proximity to markets.

(2) In defining categories of agricultural lands of long-term commercial significance for agricultural production, counties and cities should consider using the classification of prime and unique farmland soils as mapped by the Soil Conservation Service. If a county or city chooses to not use these categories, the rationale for that decision must be included in its next annual report to the department of community development.

WAC 365-190-050.

C. WASHINGTON SUPREME COURT CASE LAW

In a 1998 case, *Redmond v. Central Puget Sound Growth Management Hearings Board* (***Redmond***), 136 Wash. 2d 38 (1998), at 53, the State Supreme Court construed the statutory term "devoted to agricultural use": "We hold land is 'devoted to' agricultural use under RCW 36.70A.030 if it is an area where the *land is actually used or capable of being used* for agricultural production." (Emphasis supplied.) The Court also stated, at 53:

> [I]f land owner intent were the controlling factor, local jurisdictions would be powerless to preserve natural resource lands. Presumably in the case of agricultural land, it will always be financially more lucrative to develop such land for uses more intense than agriculture. Although some owners of agricultural land may wish to preserve it as such for personal reasons, most, . . .will seek to develop their land to maximize their return. If the designation of such land as agriculture depends on the intent of the landowner as to how he or she wishes to use it, the GMA is powerless to prevent the loss of natural resource land. All a land speculator would have to do is buy agricultural land, take it out of production, and ask the controlling jurisdiction to amend its comprehensive plan to remove the "agricultural land" designation

> . . . One cannot credibly maintain that interpreting the definition of "agricultural land" in a way that allows the land owners to control its designation gives effect to the Legislature's intent to maintain, enhance, and conserve such land . . . We decline to interpret the GMA definition in a away that vitiates the stated intent of the statute.

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In 2000, the Supreme Court further clarified that the GMA "evidences a legislative mandate for the conservation of agricultural land . . . " in *King County v. Central Puget Sound Growth Management Hearings Board* ***[King County]***, 142 Wn.2d 543, 558, 14 P.3d 133 (2000). The Court also stated:

> In summary, the agricultural lands provisions (RCW 36.70A.020(8), .060, and .170) direct counties and cities (1) to designate agricultural lands of long-term commercial significance; (2) to assure the conservation of agricultural land; (3) to assure that the use of adjacent lands does not interfere with their continued use for agricultural purposes; (4) to conserve agricultural land in order to maintain and enhance the agricultural industry; and (5) to discourage incompatible uses…
>
> Although the planning goals are not listed in any priority order in the Act, the verbs of the agricultural provisions mandate specific, direct action. The County has a duty to designate and conserve agricultural lands to assure the maintenance and enhancement of the agricultural lands to assure the maintenance and enhancement of the agricultural industry.

2. Discussion

Positions of the Parties

1. Petitioners

Petitioners contend that the County's redesignation of 110.5 acres of land from Riverway Commercial Farmland and Rural Freeway Service to Urban Commercial lacks

justification in the record and fails to protect agricultural lands of long-term commercial significance.

1000 Friends asserts that the issues raised in *1000 Friends of Washington v. Snohomish County*, CPSGMHB Case No. 03-3-00019c, relating to the redesignation of agricultural land are substantially similar to those issues already addressed by the Board in *Hensley VI.* In that case, the Board determined that Snohomish County's action was clearly erroneous when it concluded that land in question no longer met the criteria for designation as agricultural land of long-term commercial significance.

1000 Friends argues that Mrs. Roberta Winter's testimony did not provide a basis for the County to de-designate the resource land at Island Crossing. 1000 Friends' Opening Brief, at 23. At the public hearing, Mrs. Winter opined that the land was not good crop land. Partial Transcript Snohomish County Ag Board Meeting 02/06/03, at 3-4. She stated that she and her husband operated a dairy farm in the very location of the Island Crossing Interchange Docket Proposal site. *Id*. 1000 Friends states that it is apparent from the transcript that the Winters were dairy farmers, and it is unclear if they ever attempted to raise crops on their land. *Id*. 1000 Friends further points out that Ms. Winter's testimony was contradicted by statements of farmers on the Snohomish County Agricultural Advisory Committee who said they could farm Mr. Lane's land today. 1000 Friends Opening Brief, at 23.

1000 Friends provides supporting evidence that Island Crossing is being used in support of agricultural production by the pea farmers in the Stillaguamish valley. They point to record evidence from a local pea processing company stating that this land can be farmed for commercial agricultural crops. *Index of Record No. 101, Letter from Roger O. Lervick, Twin City Foods, Inc. July 9, 2003*. That testimony provides**:**

> [w]e currently contract with local growers in the Stillaguamish and Skagit valleys to raise peas for our plant in Stanwood. We have raised anywhere from 5000 acres to 10,000 acres of peas in this local area and we currently contract a portion of those acres in the Island Crossing area and have found it ideal for raising peas.

Id., at 23.

1000 Friends points out that the County's PDS conducted an analysis of the Dwayne Lane proposal. Index of Record No.21. The PDS Report recommended that the County deny Dwayne Lane's requested redesignation and rezone. Index of Record No. 21, PDS Report, at 2-3 and 14.

In addition, the PDS Report states:

> Discussion: Analysis of the proposal conducted by PDS conclude that under the GMA's minimum guidelines for classification of agricultural lands, the portion of the proposal site currently designated and zoned for

agricultural uses should continue to be classified as such. This conclusion is based on the following analysis of the GMA guidelines:

Availability of Public Facilities: Public water and sanitary sewer facilities are physically located in and adjacent to the proposal site. However, sanitary sewer service is restricted by the GPP to Urban Growth Area. The shoreline substantial development permit for the existing sewer line restricts availability of sanitary sewer to the existing parcels zoned Rural Free Way Service.

Tax Status: Several large parcels in the area (approximately 32%of the area) are classified as Farm and Agricultural Land by the Snohomish County Assessor and are valued at their current use rather than "highest and best use." The other parcels in the area, however, are valued and taxed at their "highest and best use."

Availability of Public Services: Public services such as public water and sanitary sewer service physically located within and adjacent to the proposed site. However, sanitary sewer service is restricted by the GPP to UGAs. The existing sanitary sewer line is available by conditions in the shoreline substantial development permit to existing parcels zoned Rural Freeway Service.

Relationship or proximity to urban growth areas: The proposal site is approximately 0.9 miles from the Arlington city limits and is functionally separated from the City because it is within the Stillaguamish River floodplain. The southern tip of the proposal site is adjacent to the Arlington UGA.

Land Use Settlement Patterns and Compatibility with Agricultural Practices: Most of the proposal site is currently in farm use with interspersed residential and farm buildings.

Predominant Parcel Size: Predominant parcel sizes are large and of a size typically in areas designated as commercial farmland. Nine parcels are located within the 75.5 acres of the proposal site designated Riverway Commercial Farmland. Approximate sizes of these parcels are 20.7 acres, 15.8 acres, 2.9 acres and three smaller parcels.

Intensity of Nearby Uses: More intense land uses and urban land developments are located within the Rural Freeway Commercial node at the I-5/SR interchange that has existed essentially in its present configuration since 1968. Farmland is located immediately to the east, and, separated by I-5 to the west.

> History of Land Development Permits Issued Nearby: No urban development permits have been issued in the vicinity of the proposal site except for the substantial shoreline development permit issued for the sewer line that serves only freeway commercial uses.
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> Land Values Under Alternative Uses: The area of the proposal site outside of Rural Freeway Service designation is in the floodway fringe area of the Stillaguamish River. Higher uses than farming would be difficult to locate in the area because of the floodplain constraints.
>
> Proximity to Markets: Markets within Arlington, Marysville, and Stanwood are located in close proximity to the site.

1000 Friends Opening Brief, at 28-29, quoting PDS Report, at 5-6.

1000 Friends asserts that the evidence in the County's record supports maintaining agricultural designation for the land. Petitioners point out that the above text is supported in the DSEIS at 2-32 to 2-33. They also point out that the DSEIS concluded the Dwayne Lane site (except the northwest portion designated Rural Freeway Service) is properly designated agricultural and that removal of that designation would conflict with the statutory duties of the GMA. DSEIS, at 2-36. "Most of the proposed site is currently in farm use with interspersed residential and farm buildings." Index of the Record No. 22, DSEIS, at 2-33.

CTED agrees with 1000 Friends arguments concerning redesignation of agricultural resource lands. It observes that in a prior case:

> [The Board explained that when UGA expansions are challenged, the record must provide support for the actions the jurisdiction has taken; "otherwise the action may be determined to have been taken in error - *i.e.*, clearly erroneous;" accordingly, counties must "show their work" when a UGA is expanded. The work they must show is the completion of a valid land capacity analysis, and any expansion of a UGA must be supported by that land capacity analysis.

CTED'S Opening Brief, at 21, quoting *Kitsap Citizens*,[3] at 13.

Petitioners 1000 Friends and Stillaguamish Flood Control District requested that the Board enter a finding of invalidity for Ordinance No. 03-063. 1000 Friends PFR, at 5. Petitioner CTED did not join in the request for Invalidity.

In addition, CTED asserts Ordinance 03-063 fails to comply with RCW 36.70A.060, RCW 36.70A.170, and RCW 36.70A.020(8) when the ordinance re-designates agricultural lands in the Island Crossing area for urban commercial development, and

[3] *Kitsap Citizens for Rural Preservation v. Kitsap County (**Kitsap Citizens**)*, CPSGMHB Case No. 00-3-0019c, Final Decision and Order, May 29, 2001.

places them into the Arlington UGA, even though the agricultural lands continue to meet the statutory criteria for designation. CTED'S Opening Brief, at 30. CTED cites Board precedent regarding local governments' duties under the GMA to conserve agricultural lands:

> In *Green Valley, et al., v. King County* (No. 98-3-0008c), this Board characterized the GMA's several agricultural lands provisions as creating an "agricultural conservation imperative that imposes an affirmative duty on local governments to designate and conserve agricultural lands to assure the maintenance and enhancement of the agricultural resource industry."

Id., at 31.

CTED points out that the Board's *Green Valley* decision was affirmed by the State Supreme Court, as follows:

> In summary, the agricultural lands provisions (RCW 36.70A.020(8), .060, and .170) direct counties and cities (1) to designate agricultural lands of long-term commercial significance; (2) to assure the conservation of agricultural land; (3) to assure that the use of adjacent lands does not interfere with their continued use for agricultural purposes; (4) to conserve agricultural land in order to maintain and enhance the agricultural industry; and (5) to discourage incompatible uses …
>
> Although the planning goals are not listed in any priority order in the Act, the verbs of the agricultural provisions mandate specific, direct action. The County has a duty to designate and conserve agricultural lands to assure the *maintenance* and enhancement of the agricultural lands to assure the maintenance and enhancement of the agricultural industry."

Id., at 32, quoting the Supreme Court's language in *King County v. Central Puget Sound Growth Management Hearings Board*, 142 Wn.2d 543, 558, 14 P.3d 133 (2000).

To support its assertion that landowner intent is not the controlling factor in determining the long-term commercial significance of agricultural resource lands, CTED cites the initial Supreme Court case that addressed the GMA's agricultural resource lands provisions:

> [T]here are compelling reasons against concluding the Legislature intended current use or land owner intent to control the designation of natural resource lands under the GMA. First, if current use were a criterion, GMA comprehensive plans would not be plans at all, but mere inventories of current land use. The GMA goal of maintaining and enhancing natural resource lands would have no force; it would be subordinate to each individual land owner's current use of the land …

> Second, if land owner intent were the controlling factor, local jurisdictions would be powerless to preserve natural resource lands…All a land speculator would have to do is by agricultural land, take it out of production, and ask the controlling jurisdiction to amend its comprehensive plan to remove the "agricultural land" designation…[T]he controlling jurisdiction would have no choice but to do so, because the land is no longer being used for agricultural purposes.

Id., at 33, quoting *Redmond v. Central Puget Sound Growth Management Hearings Board*, 136 Wn.2d 38, 52-53, 959 P.2d 1091 (1998).

CTED asserts the agricultural lands in the Island Crossing area continue to qualify for designation as agricultural lands of long-term commercial significance under the GMA. *Id.*. CTED cites to the DSEIS, at 2-26, to describe the consequences that the adoption of Ordinance No. 03-063 would have for the agricultural lands in the Island Crossing area as well as abutting agricultural lands in the Stillaguamish Valley:

> Approval of the Comprehensive Plan Amendment and concurrent rezone to General Commercial would result in new development on portions of the subject site that are currently undeveloped or in agricultural use. This analysis assumes that existing freeway service uses would remain in place and new development would replace existing agricultural and single-family residential uses….
>
> Compatibility of Use and Intensity
>
> Future commercial development on the subject site would occur at intensities significantly greater than exiting conditions and would increase activity levels in the area. This development would be compatible with existing commercial uses located within the site and to the west of I-5. I-5 would provide a barrier to the west between the potential commercial development and existing agricultural lands. However, because of the intensity of proposed commercial uses, this development would be incompatible with agricultural uses located to the north and east of the site.
>
> Cumulative Impacts
>
> In conjunction with other proposed development in Snohomish County the Proposed Action would contribute to cumulative increases in county land converted from agricultural to commercial uses. This growth would continue to increase the local demand for public facilities and services.

Id., at 34-35.

CTED agrees with 1000 Friends that the DSEIS concluded that the lands in Island Crossing designated for agriculture prior to the adoption of Ordinance 03-0063 continued to meet the statutory criteria for designation as agricultural lands of long term commercial significance. In addition, CTED points to the DSEIS:

> *The County's records establish that the Dwayne Lane site (except for the northwest portion designated Rural Freeway Service) is properly designated agricultural and that removal of that designation would conflict with the statutory duties of the GMA.* Also, the removal of the Riverway Commercial Farmland designation does not meet the criteria in the County's GPP for redesignation of agricultural land and would be inconsistent with recent cases regarding agricultural land redesignation before the Central Puget Sound Hearings Board and the Washington State Supreme Court. When the Snohomish County Council considered the designation of the site in 1998, it concluded that the site met the criteria for designation as agricultural land of long-term significance as defined in the GPP and met the State's minimum guidelines for classification as agricultural lands under GMA. *Circumstances have not changed since this Council decision in 1998.*

Id., at 37. Emphasis by CTED.

CTED also provides that the "Staff Report recommended that the County Council reject the proposed ordinance, based in part on the following summary conclusion related to agricultural designation:

> 1. The proposal by Dwayne Lane to expand the Arlington UGA and amend the GPP's FLUM to redesignate 110.5 acres from Rural Freeway Service and Riverway Commercial Farmland to Urban Commercial is not consistent with the policies under Goal LU7 in the GPP to conserve agricultural land. *The proposal site is composed of prime agricultural soils and meets all of the criteria in the GPP under Implementation Measure LU 7a for continued designation as agricultural land of long-term significance as defined by the GPP.*
>
> *Additionally, consideration of the state's minimum guidelines in the Washington Administrative Code (WAC) indicates that the Dwayne Lane site should continue to be classified as agricultural lands under the GMA.*

Id., at 37-38, quoting PDS Report, at 14, emphasis by CTED.

2. Respondent and Intervenor

Snohomish County asserts that Petitioners' arguments ignored considering the land's proximity to population areas and the possibility of more intense uses of land when determining whether land is of long-term commercial significance. Snohomish County's Response Brief, at 12. Snohomish listed the ten CTED guidelines and acknowledged

them as the specific indicators to assist jurisdictions in considering the effects of proximity to population areas and the possibility of more intense uses of land. *Id.*, at 13. Snohomish provides as evidentiary support the text from the County Council's findings of fact and conclusions in the signed and passed Amended Ordinance 03-063. *Id.*, at 14-15. It did not provide the results from the PDS Report and DSEIS.

Snohomish asserts that the County Council considered the recommendations of the Planning Commission; the County Planning staff; the guidelines in the GMA and CTED; and reviewed all public testimony and comments before making its decision. Snohomish Response Brief, at 14.

Intervenor Lane contends that the land in Island Crossing is urbanized in nature, does not meet the standards to classify it as agricultural, and is properly designated urbanized and properly placed in Arlington's UGA. Lane Response, at 7. Lane claims that the "110.5 acre site already contains several businesses and public utilities services," and that the "land is approximately 4000 feet from the Arlington city limits and actually abuts the Arlington UGA on the South." *Id.*, at 8. Intervenor also argues that Island Crossing has an "urbanized character of land under the GMA" because of the "existing water/sewer line." *Id*.

In reviewing the guidelines from WAC 365-190-050, Lane argues the land is not devoted to agriculture because: 1.) the parcel owned by Lane has not been actively farmed on a commercially productive basis for nearly thirty years; 2.) evidence of the record shows that small-scale farms have not been commercially successful in the area for a number of years; 3.) due to the heavy use of roads surrounding the property, farming the land is not only unproductive, it is hazardous; and 4.) Mrs. Winter actually wanted to farm the land but could not. *Id.*, at 12. In addition, Intervenor asserts that, while landowner intent is not the controlling factor in determining whether land is devoted to agriculture or not, however land owner intent is to be considered along with other factors in making a proper designation. *Id.*, at 13.

Lane states the land use settlement patterns and their compatibility with agricultural practices do not support an agricultural determination. *Id.*, at 16. "A portion of the Island Crossing area is already developed as Freeway Service. It is made up of approximately 35 acres and contains three gas stations, three restaurants, a motel, and espresso stand, hay harvesting and two single-family homes. In addition, roadside services are operated by the Stillaguamish Tribe on a 2.5 acre triangular parcel at the Smokey Point Boulevard and State Route 530 intersection." *Id.*, at 15.

Intervenor asserts that the staff recommendation was dated February 24, 2003, and the "inquiry made by the staff to determine designation was made under the auspices of this Board's holding that in order to show an agricultural parcel be de-designated from agricultural land, the evidence must show "demonstrable and conclusive evidence the Act's definitions and criteria for designation" are no longer met. *Id*., at 18. Lane argues that the staff believed the applicant must "present demonstrable and conclusive evidence of changed circumstances to justify it de-designation." *Id.* However, Lane states the

Court of Appeals clarified the standard utilized by the Board and that the county staff did not have the benefit of that guidance. *Id.* Intervenor also states that after the PDS report, hearings were held before the council on July 9, 2003, which included testimony and other evidence which now comprise the complete record before the Council. *Id.*, at 19.

Lane attacks the PDS report/discussion regarding the application of the GMA guidelines contains as inconsistent and inaccurate. *Id.*, at 19. Lane asserts the following:

> For the availability of public facilities, the report concludes that sewer service is limited by shoreline issues and permitting limitations, which is contrary to the statutory mandate that permitting issues are not to be utilized for planning decisions (RCW 36.70A.470(1)(a). *Id.*
>
> For tax status, the PDS report admits that only 32% of the land is taxed as agricultural, and that under the current configuration, not even a majority of the land is carried as agricultural land. *Id.*, at 19
>
> For land use settlement patterns and compatibility with agricultural practices, the PDS report finds "most" of the area is in current farm use, yet the report shows less than half (32%) of the property is taxed as agricultural land. The report fails to note the adverse impact traffic patterns have on any farming activities.
>
> For history of land development permits issued nearby, the record shows that over 200 homes have been constructed on nearby property over the last ten years (see index #127 CPSGMHB, items 23 and 67 in HBA packet.)
>
> For sewer service boundary, the property has a portion of land which has been included in sewer service boundaries pursuant to agreement between the Cities of Marysville and Arlington.

Id., at 19-23.

Analysis

As this Board has previously observed, there are two requirements in the designation, or de-designation, of agricultural lands under the Growth Management Act. "The first is the requirement that the land be "devoted to" agricultural usage. The second is that the land must have 'long-term commercial significance' for agriculture." *Hensley VI*, at 36.[4]

1. Are the 75.5 Acres at Island Crossing "devoted to" agriculture"?

The Board answers this question in the affirmative. A plain reading of the Supreme Court's holdings suggests that if land has ever been *used for agriculture* or is *capable of*

[4] *Hensely, et al., v. Snohomish County (**Hensely VI**)*, CPSGMHB Case No. 03-0-0009c, Final Decision and Order, Sep. 22, 2003.

being used for agriculture, it meets the "devoted to" prong of the test. *Redmond v. Central Puget Sound Growth Management Hearings Board* (***Redmond***), 136 Wash. 2d 38 (1998), at 53. There does not appear to be a dispute regarding whether the 75.5 acres at Island Crossing have ever been farmed, so the Board arguably could end that part of its inquiry here. However, because the County focuses much of its argument on the contention that soils conditions somehow preclude agricultural use at Island Crossing, the Board will proceed.

Here, Petitioners have made a *prima facia* case supporting the assertion that there have been no changes to the soil condition, nor any changed circumstances that could support the County's revision of the 75.5 acres from agricultural resource lands to non-agricultural resource lands commercial uses. Petitioners rely upon Board and Court case law, evidence in the record (regarding soil classification systems and long-term commercial significance) to undercut the County's assertion that its action is supported by the record.

For example, Petitioner CTED disputes the "Finding No. 7" of Ordinance No. 03-063 that "Farming is no longer financially viable at Island Crossing." CTED argues: "Related to finding number 7, the ordinance also includes a finding based on testimony received from a landowner in the Island Crossing area who testified the land could not be profitably farmed . . . None of these findings justifies the dedesignation of agricultural lands in the Island Crossing area." CTED PHB, at 38.

CTED cites federal soils information to overcome the County's assertion that the Puget soils found at Island Crossing are not "prime." Petitioner asserts that whether or not Ragnar soils are the "best" soils for agricultural production is not the proper analysis since: "Logically, only one soil type could be the 'best.' The appropriate analysis is to examine soil types by reference to growing capacity, productivity, and soil composition." *Id.* In order to compare the Ragnar soils that the County identifies as the "best" with the Puget soils that predominate at Island Crossing, CTED cites information from the U.S. Department of Agriculture, Natural Resource Conservation Service classifying Snohomish County soils.

From a review of the information contained in a table derived from that federal website,[5] the Board agrees with CTED's contention that "Neither soil type is uniformly superior to the other. Both soils types are considered 'prime agricultural soils'." CTED PHB, at 39. For the County to conclude otherwise, and more fundamentally for the County to conclude that the Riverway Commercial Farmland acreage at Island Crossing was not "devoted to" agricultural use, was clear error.[6]

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[5] Pursuant to WAC 242-02-670(2), the Board takes official notice of U.S. Department of Agriculture soils information on Snohomish County posted at www.or.nrcs.usda.gov/pnw_soil/washington/wa661.html .

[6] As the Board noted in a recent Snohomish County case:

> T]he County did not alter its criteria for designating agricultural land to include *only those soils*, according to SCS soils capability criteria, *without constraints*, such as drainage limitations. Had the County done so, the necessity to "de-designate existing agricultural lands," which no longer met its designation criteria, would have likely affected far more designated agricultural land than the . . . area affected by the

2. Do the 75.5 acres of land at Island Crossing have long-term commercial significance?

Again, the Board answers in the affirmative. The County relies upon its Finding T, set forth in Finding of Fact 3 *supra*, to support its conclusion that the Riverway Commercial Farmland no longer has long-term commercial significance. The "evidence" relied upon is testimony from an individual who operated a dairy farm in the vicinity fifty years ago who opined that she sold her farm "because the land could not be profitably farmed." Ex. 111. Anecdotal testimony, particularly from an individual whose direct experience with the area is decades removed from the present and whose declared expertise was in dairy rather than crop farming, does not constitute credible evidence on which to support the County's action. Also, as Petitioners noted, this "Finding" was contradicted by others with present-day experience in crop farming in the Stillaguamish Valley. 1000 Friends Opening Brief, at 23.

Further damaging to the credibility of the County's reasoning supporting its action is that nowhere do Respondent or Intervenor cite to credible, objective evidence to refute or reconcile the substantial record evidence (*i.e.*, the PDS report, the DSEIS, USDA soils survey) to the contrary. The Board acknowledges the County's assertion that the Council *considered* the contrary recommendations of the County Planning staff and Agriculture Advisory Board, as well as the guidelines in the GMA, CTED's procedural criteria, and reviewed all public testimony and comments before making its decision. Snohomish Response Brief, at 14. To the extent that there is no dispute that this evidence was placed before the Council before it took action adopting Ordinance No. 03-063, it can be said that the legislative body "considered" that evidence. However, the only record support cited by the County and Intervenor in support of dedesignation are far less credible than the substantial contrary evidence in this record.

As discussed, *supra*, County "Finding B.6" which asserts that "Puget Soils are not prime" is not supported by objective soils science, nor can the Board assign much weight to the dated, anecdotal testimony referenced in "Finding T." Even less weight can be accorded to the unsupported and conclusory statements of the County's "Finding B.7" [Farming is no longer financially viable] and "Finding B.8" [The County is growing rapidly and it is inevitable that sites like Island Crossing will be converted from agricultural uses to commercial uses.] These latter two findings are expressions of intent or opinion, rather than objective, scientifically respectable facts.

To the extent that the County and Intervenor rely upon the materials prepared by the consulting firm of Higa-Burkholder, the Board notes that this information was prepared at the behest of Mr. Dwayne Lane,[7] prime sponsor of the "Dwayne Lane Proposal for 2003 Final Docket Amendments." Mr. Lane is one of the property owners in the Island

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> amendment. Instead, without amending its own agricultural land soils designation criteria, the County apparently decided that a new soil constraint criterion, regarding drainage, should be applied only to this area.

Hensley VI, at 37 , footnote omitted.

[7]Counsel for Intervenor Lane stated that Mr. Burkholder, author of the HBA Report cited in support of the County's action, was retained by Mr. Lane. Transcript, at 70.

Crossing area and has specific interests and intentions relative to the land use of his property.[8] Therefore, the Board construes any record declarations or conclusions entered by Mr. Lane's consultants to be reflections, if not direct expressions, of "landowner intent" and assigns them the appropriate weight (*i.e.*, expressions of landowner intent, alone, are not determinative). As to the arguments presented in Intervenor's briefing, the Board is not persuaded that they provide support to the County's action de-designating agricultural resource lands and including Island Crossing in the UGA. Lane asserts that Island Crossing is "urbanized in nature" due to the existing improvements, including freeway service structures (Lane Response, at 16) and utility lines (Lane Response, at 7-8) nearby. The Board rejects this reasoning. We agree with Petitioners that the commercial uses presently in Island Crossing are, as the County has correctly designated them for years, "Freeway Service" uses, not urban uses. As to the proximity of utility service, the Board notes that their availability is in dispute, in view of permit and Shoreline Master Program restrictions. Even if there were no such restrictions, the mere presence of utility lines does not mandate urbanization.[9] As for the Intervenor's arguments regarding the Lane parcel having "not been actively farmed" for thirty years (Lane Response, at 12), the Supreme Court's language regarding "devoted to" makes no distinction about whether land was farmed thirty days or thirty years ago.

The Board also rejects the argument that off-site impacts of the County's action are limited. If the limited commercial freeway service uses now at Island Crossing create "hazardous" impacts for existing agricultural activities (Lane Response, at 13), how can those same impacts on surrounding areas be any less from the panoply of urban uses allowed in the County's "General Commercial" zone? A review of the geometry and topography of this area (Findings of Fact 8 through 17) shows that the County's action would truly create an "urban island" almost completely surrounded by resource lands.

Moreover, no record evidence supports the assertion in Ordinance No. 03-063 "Finding S" that this action "is not precedent for redesignation of Agricultural Land in the Stillaguamish Valley." It is an axiom of land use planning that urban uses at urban densities and intensities inhibit adjacent farm operations, and the County points to no evidence here to expect a different result in the immediate vicinity. The very fact that it felt compelled to declare that this action "is not a precedent" suggests that even the County Council anticipates the real estate speculation and conversion pressures that Ordinance No. 03-063 would fuel. Even assuming the best of intentions in "Finding S," there is no record evidence to suggest that the County's simple declaration can stem what historically has been an unyielding tide.

In summary, the Board concludes that the County's Ordinance draws scant credible and objective support from the record. In contrast, the arguments advanced by Petitioners,

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[8]Mr. Lane's ambitions to place an automobile dealership on his property at Island Crossing is chronicled not only in this record, but prior litigation regarding Island Crossing. *See* generally Dwayne Lane Motion to Intervene.

[9]The Board has previously observed that mere adjacency to urban services, such as utilities, or city limits "does not impose requirement that this territory be included within a UGA, unless existing cities cannot accommodate the additional projected growth and it is otherwise an appropriate location for such growth." *Tacoma v. Pierce County*, CPSGMHB Case No. 94-3-0001, Final Decision and Order, Jul. 5, 1994.

are supported by credible and objective evidence in the record. The record suggests that the land continues to meet the criteria for the designation of agricultural land. This is true regarding the question of prime farmland soil characteristics and whether the 75.5 acres are of long-term commercial significance. Contrary to the County's Ordinance Finding, the record weighs heavily toward the denial of the de-designation. The Board's review of the record and arguments presented, leads to the conclusion that the 75.5 acres previously designated as Riverway Commercial Farmland are **devoted to agriculture** and **continue to be of long-term commercial significance** and should not have been de-designated from the Riverway Commercial Farmland designation and A-10 zoning.

The Board concludes that the County's action removing the resource lands designation from 75.5 acres at Island Crossing was unsupported by the record and therefore was **clearly erroneous**. The Board therefore concludes that the County's reclassification of those lands from Riverway Commercial Farmland to Urban Commercial and the rezoning of them from Agriculture-10 Acres to General Commercial (CG) as contained in Ordinance No. 03-963, **does not comply** with the requirements of RCW 36.70A.170(1)(a), and RCW 36.70.060(1) and WAC 365-190-050 (pursuant to RCW 36.70A.050 and .170(1)(a)). Because RCW 36.70A.050 creates a duty for DCTED in its role adopting guidelines pursuant to WAC 365-190-050, rather than a duty for local governments, the Board dismisses the portion of Legal Issue No. 2 that alleges County noncompliance with RCW 36.70A.050.

3. Conclusions re: Legal Issue 2

The Board concludes that the Petitioners have carried the burden of proof to show that Snohomish County Ordinance No. 03-063 **failed to be guided by and did not substantively comply** with RCW 36.70A.020(8) and that it **failed to comply** with RCW 36.70A.040, .060(1) and .170(1)(a). The Board finds that the County's action was **clearly erroneous** in concluding that this land no longer meets the criteria for designation as agricultural land of long-term commercial significance. The Board will **remand** Ordinance No. 03-063 for the County to take legislative action to bring it into compliance with the goals and requirements of the Act.

C. URBAN GROWTH AREA EXPANSION ISSUES

Legal Issue No. 1

Does the County adoption of Amended Ordinance No. 03-063, establishing a new and larger Urban Growth Area (UGA) for the City of Arlington (Arlington), fail to comply with RCW 36.70A.020(1), (2), (8), and (10) (planning goals requiring encouragement of urban growth in urban areas, reduction of sprawl, enhancement of natural resource industries and protection of the environment), RCW 36.70A.110 and RCW 36.70A.215 (limiting UGA expansions to land necessary to accommodate projected future growth and setting priorities for the expansion of urban growth areas) when the record fails to establish that the expansion is supported by a land use capacity analysis and that this

larger UGA is necessary to accommodate OFM population forecasts as required under the GMA?

Legal Issue No. 4

By expanding the Arlington UGA without a supporting land use capacity analysis that demonstrates additional commercial land is needed in the Arlington UGA, is Snohomish County Amended Ordinance No. 03-063 in noncompliance with Policy UG-14 of the Snohomish County County-Wide Planning Policies and therefore in noncompliance with RCW 36.70A.210(1)?

1. Applicable Law

Several provisions of the GMA are intertwined as they relate to the location, sizing, review and evaluation and expansion of UGAs. RCW 36.70A.110, and .215 deal directly with UGAs and their evaluation and expansion. RCW 36.70A.210 provides that county-wide planning policies are to be adopted to, among other things, implement the provisions of RCW 36.70A.110. Several GMA Goals from RCW 36.70A.020 also address where urban growth should be, or should not be, encouraged. The provisions of the Act challenged by Petitioners are set forth below.

RCW 36.70A.110 generally addresses the creation of UGAs. RCW 36.70A.110(1) deals with locational criteria for delineating boundaries of UGAs, and .110(3) pertains to locating or sequencing urban growth within UGAs. RCW 36.70A.110(2) regards sizing UGAs; it provides in relevant part:

> Based upon the growth management population projection made for the county by the office of financial management, the county and each city within the county shall include areas and densities sufficient to permit the urban growth that is projected to occur in the county or city for the succeeding twenty-year period. Each urban growth area shall permit urban densities and shall include greenbelt and open space areas. An urban growth area determination may include a reasonable land market supply factor and shall permit a range of urban densities and uses. In determining this market factor, cities and counties may consider local circumstances. Cities and counties have discretion in their comprehensive plans to make many choices about accommodating growth.

RCW 36.70A.210 requires the County, in collaboration with its cities, to adopt county-wide planning policies which are to be "used solely for establishing a county-wide framework from which county and city comprehensive plans are developed and adopted pursuant to this chapter."

The GMA's Goals are to "guide the development of comprehensive plans and development regulations." With regard to the legal issues in this case, the relevant Goals of RCW 36.70A.020 are:

(1) Urban growth. Encourage development in urban areas where adequate public facilities and services exist or can be provided in an efficient manner.
(2) Reduce sprawl. Reduce the inappropriate conversion of undeveloped land into sprawling, low -density development.
. . . .
(8) Natural resource industries. Maintain and enhance natural resource-based industries, including productive timber, agricultural, and fisheries industries. Encourage the conservation of productive forest lands and productive agricultural lands, and discourage incompatible uses.
. . . .
(10) Environment. Protect the environment and enhance the state's high quality of life, including air and water quality, and the availability of water.

RCW 36.70A.215(1) requires the County and its cities to adopt county-wide planning policies to establish a review and evaluation program – the "buildable lands" report and review. The purpose of the review and evaluation program is to:

(a) Determine whether a county and its cities are achieving urban densities within urban growth areas by comparing growth and development assumptions, targets, and objectives contained in the county-wide planning policies and the county and city comprehensive plans with actual growth and development that has occurred in the county and its cities; and
(b) Identify reasonable measures, other than adjusting urban growth areas, that will be taken to comply with the requirements of this chapter.

The first evaluation, or "buildable lands report," was to be completed by September 1, 2002. RCW 36.70A.215(2)(b). The evaluation component, described in RCW 36.70A.215(3), is required to:

(a) Determine whether there is *sufficient suitable land to accommodate the county-wide population projection* established for the county pursuant to RCW 43.62.035 and the subsequent population allocations within the county and between the county and its cities and the requirements of RCW 36.70A.110;
(b) Determine the *actual density of housing* that has been constructed and the *actual amount of land developed for commercial and industrial uses within the urban growth area* since the adoption of a comprehensive plan under this chapter or since the last periodic evaluation as required by subsection (1) or this section; and
(c) Based upon the actual density of development as determined under (b) of this subsection, *review the commercial, industrial and housing needs by type and density range to determine the amount of land*

needed for commercial, industrial and housing for the remaining portion of the twenty-year planning period used in the most recently Petitioners 1000 Friends and Stillaguamish Flood Control District requested that the Board enter a finding of invalidity for Ordinance No. 03-063. 1000 Friends PFR, at 5. Petitioner CTED did not join in the request for Invalidity.

(Emphasis supplied).

Snohomish County CPP UG-14(d), as amended by Section 2 of Ordinance No. 03-072, [Exhibit J to CTED Opening Brief], (new language is shown underlined; deleted language is shown in ~~strikeout~~) provides in relevant part:

d. **Expansion of the Boundary of an Individual UGA**: Expansion of the boundary of an individual UGA to include additional residential, commercial and industrial land shall not be permitted unless it is supported by a land capacity analysis adopted by the County Council pursuant to RCW 36.70A.110 and otherwise complies with the Growth Management Act, includes consultation with appropriate jurisdictions in the UGA or MUGA, and one of the following ~~four~~ ten conditions are met; provided that conditions six through eight do not apply to the Southwest UGA:

. . .

4. ~~Both of the following conditions are met f~~For expansion of the boundary of an individual UGA to include additional commercial and industrial land~~:~~,
   a. ~~T~~the county and city or cities within that UGA document that commercial or industrial land consumption within the UGA (city plus unincorporated UGA combined) since the start of the twenty-year planning period, equals or exceeds fifty percent of the developable commercial or industrial land supply within the UGA at the start of the planning period. In UGAs where this threshold has not yet been reached, the boundary of an individual UGA may be expanded to include additional commercial or industrial land if the expansion is based on an assessment that concludes there is a deficiency of larger parcels within that UGA to accommodate the remaining commercial or industrial growth projected for that UGA. Other parcel characteristics determined to be relevant to the assessment of the adequacy of the remaining commercial or industrial land base, as documented in the ~~Procedures Report required by UG-14(a)~~ most recent Snohomish County Tomorrow Growth Monitoring Report of the bulidable lands review and evaluation (Buildable Lands Report), as they may be confirmed or revised based upon any new information presented at public hearings, may also be considered as a basis for expansion of the boundary of an individual UGA to include additional commercial or industrial land.~~;~~ ~~and~~
   b. ~~The county and the city or cities within the UGA consider reasonable measures adopted as an appendix to the Countywide Planning Policies pursuant to UG-14(b) that could be taken to increase commercial or~~

~~industrial land capacity inside the UGA without expanding the boundaries of the UGA.~~

. . .

10. The expansion will result in the economic development of lands that no longer satisfy the designation criteria for natural resource lands and the lands have been redesignated to an appropriate non-resource land use designation. Provided that expansions are supported by the majority of the affected cities and towns whose UGA or designated MUGA is being expanded and shall not create a significant increase in the total employment capacity (as represented by permanent jobs) of an individual UGA, as reported in the most recent Snohomish County Tomorrow Growth Monitory (*sic*) Report in the year of expansion.

2. Discussion

Positions of the Parties

1. Petitioners

1000 Friends argues that the Island Crossing UGA expansion does not comply with the Act for four reasons: 1) the expansion is isolated from any area characterized by urban growth; 2) there is no basis in the record supporting the need for additional urban land to accommodate the projected population growth; 3) the expansion is into designated agricultural lands; and 4) the expansion area contains critical areas. 1000 Friends' Opening Brief, at 8 – 17.

CTED contends that Ordinance 03-063 fails to comply with RCW 36.70A.110, RCW 36.70A.215 and RCW 36.70A.210(1) because the ordinance expands the Arlington UGA to include the Island Crossing area and redesignates the Island Crossing area for urban commercial development without the supporting land use capacity analysis that demonstrates additional commercial land is needed in the Arlington UGA. CTED asserts that under RCW 36.70A.110 and RCW 36.70A.215, the size and location of urban growth areas must be supported by a land capacity analysis, and states that in *Master Builders Association v. Snohomish County*[10], the Board held that changes in the size of an urban growth area must be supported by a land use capacity analysis: "If UGAs are altered and challenged, which is not the case here, this Board requires an accounting to support the alteration." CTED Opening Brief, at 20.

Further, CTED contends that the County's Final Buildable Lands report does not support the need for additional commercial or industrial land. CTED notes that the County's DSEIS and staff reports confirm this conclusion. "The proposed expansion of the Arlington UGA for additional commercial/industrial capacity does not meet Policy UG-14's 50% threshold condition under either scenario. . . Approval of the Dwayne Lane

[10] CPSGMHB Case No. 01-3-0016, Final Decision and Order, Dec. 13, 2001.

proposal would, therefore, be inconsistent with GPP and CPP policies regarding review and evaluation of boundary expansions to an individual UGA." *Citing* DSEIS at 2-36 to 2-37, *Id*., at 25. Additionally, [the proposed UGA expansion] "is inconsistent with Countywide Planning Policy UG-14 and GPP Policy LU 1.A.9 since the proposed expansion of the Arlington UGA for additional commercial/industrial capacity does not meet the 50% threshold condition in [these CPPs and GPPs]. *Citing* Staff report at 14, *Id*., at 26.

Finally CTED concludes "There is nothing in the [buildable lands report] that supports the expansion of the Arlington UGA to include the Island Crossing area." *Id.*, at 27.

2. Respondent and Intervenor

In response, Snohomish County contends that in expanding the UGA it "concluded that Island Crossing is already characterized by urban growth." County Response, at 16. To support this conclusion the County noted the area's proximity to the existing Arlington UGA, and noted a commercial area on the northern edge of Island Crossing, which contains impermeable surfaces and water and sewer service which could be available to the Island Crossing area. County Response, at 16-17.

Intervenor acknowledges that the County's existing land capacity analysis may not have supported expansion, but CPP UG-14(a)(4) [*sic* (d)(4)], as recently amended, allows for revision if new information is presented at public hearings. Lane Response, at 24-25. Intervenor continues, "[CPP UG-14(d)(4)] does not specify the date of the land capacity analysis which must be used to support a change in the UGA. If a valid capacity analysis exists, the criteria for change in UG-14 may be applied in consideration of the most recent capacity analysis." *Id.*, at 26.

3. Petitioners' Reply

1000 Friends replies that the commercial area on the northern edge of the Island Crossing UGA expansion area is a "Rural Freeway Service" area designated to serve travelers with limited sewer access to serve the newly established UGA; further, it is not characterized by urban growth, since it serves the traveling public and surrounding rural population. 1000 Friends Reply, at 24. Additionally, Petitioners argue that the UGA expansion area is not adjacent to lands characterized by urban growth since the Arlington UGA only "touches Island Crossing at the southern tip" of the area. *Id*., at 25.

CTED reiterates that there is no land capacity analysis, or information in the buildable lands report, that supports a UGA expansion into the Island Crossing area. CTED Reply, at 9-10. Also, CTED contends that the expansion area only touches the Arlington UGA via a right-of-way along the roadway; and that the limited commercial development at the freeway interchange does not make it urban in character, even if a sewer line is present at the edge of the area. *Id.*, at 11.

Analysis

In its discussion of Legal Issue 2, *supra*, the Board concluded that removing the resource land designation for the area and designating it as urban commercial did not comply with the relevant provisions of the Act.[11] The Board now turns to whether the inclusion of the area into the UGA complies with the GMA.

As to whether the expanded UGA for Island Crossing meets the *locational* requirements of RCW 36.70A.110, the Board agrees with Petitioners. The closest point of contact between Arlington's city limits and private property within the expansion area is approximately 700 feet. *See* Findings of Fact 10 through 14. Also, the fact that limited sewer service is adjacent to, or even existing within, a rural area is not dispositive on the question of whether the area is urban in character.[12] Therefore, the Board concludes that the subject property is not "adjacent to land characterized by urban growth," and does not comply with RCW 36.70A.110(1).

As to the *sizing* requirements for UGAs as set forth in RCW 36.70A.110(2) and .215, and *consistency* with CPP UG-14(d) [RCW 36.70A.210(1)], the Board also agrees with Petitioners. First, neither the County nor Intervenor indicates that a revised land capacity analysis supporting the need for a commercial/industrial UGA expansion has been conducted. *See* County Response, at 16-17; and Lane Response, at 24-25. Intervenor even acknowledges that the existing land capacity analysis may not have supported expansion. *See* Lane Response, at 24-25. Second, CTED correctly argues that there is nothing in the County's recent Buildable Lands Report that supports the expansion of the Arlington UGA for commercial or industrial uses to include the Island Crossing area. The County does not dispute this assertion. *See* County Response, at 16-17. Intervenor Lane however, argues that CPP UG-14(d)(4)[13] allows the County to revise its land capacity analysis to reflect information obtained through public hearings, which Lane contends was provided in consideration of this action. Lane Response, at 25.

Nonetheless, there has not been a revision to the County's land capacity analysis that supports the expansion of this UGA for commercial or industrial uses. Therefore, the Board concludes that the expansion of the Arlington UGA to include the Island Crossing area does not comply with RCW 36.70A.110 and .215 and is not consistent with CPP UG-14(d) and RCW 36.70A.210(1). Further, since the County has **not complied** with the UGA requirements of RCW 36.70A.110, .215 and its own CPPs (RCW 36.70A.210),

[11] The Board notes that RCW 36.70A.060 does not prohibit agricultural resource lands from being included within a UGA. However, RCW 36.70A.060(4) requires a program authorizing transfer or purchase of development rights as a condition precedent to such inclusion in the UGA. In this case, none of the parties argued or offered any evidence pertaining to whether such a program exists to allow agricultural land within the UGA.

[12] *See* footnote 9, *supra*.

[13] The Board notes that even if CPP UG-14(d)(10) is offered as the basis for this UGA expansion, the Board agreed with the County and held that CPP UG-14(d)(preamble) requires a land capacity analysis to support an individual UGA expansion for commercial/industrial development. In either case, the required land capacity analysis has not been conducted in the present case. *See CTED v. Snohomish County*, CPSGMHB Case No. 03-3-0017, Final Decision and Order, (Mar. 8, 2004), at 37-39.

the Board also concludes that the County's action **was not guided by Goals 1, 2, and 8** [RCW 36.70A.020(1), (2), and (8).

3. Conclusions re: Legal Issues 1 and 4

The Board concludes that the Petitioners have carried the burden of proof to show that Snohomish Ordinance No. 03-063 **failed to be guided by and did not substantively comply** with RCW 36.70A.020(1), (2), and (8) and that it **failed to comply** with RCW 36.70A.110, .210(1) and .215. The Board concludes therefore the County action adopting Ordinance No. 03-063 was **clearly erroneous** and will **remand** Ordinance No. 03-063 for the County to take legislative action to bring it into compliance with the goals and requirements of the Act as interpreted and set forth in this Order.

3. Conclusions re: Legal Issues 1 and 4

The Board concludes that the Petitioners have carried the burden of proof to show that Snohomish Ordinance No. 03-063 **failed to be guided by and did not substantively comply** with RCW 36.70A.020(1), (2), and (8) and that it **failed to comply** with RCW 36.70A.110, .210(1) and .215. The Board concludes therefore the County action adopting Ordinance No. 03-063 was **clearly erroneous** and will **remand** Ordinance No. 03-063 for the County to take legislative action to bring it into compliance with the goals and requirements of the Act as interpreted and set forth in this Order.

D. CRITICAL AREAS ISSUE

Legal Issue No. 5

By expanding the Arlington UGA into a frequently flooded area and by redesignating lands within that are for commercial use, is Snohomish County Amended Ordinance No. 03-063 in noncompliance with RCW 36.70A.060 and RCW 36.70A.170?

1. Applicable Law

RCW 36.70A.030(5) provides:

> "Critical areas" include the following areas and ecosystems: (a) Wetlands; (b) areas with a critical recharging effect on aquifers used for potable water; fish and wildlife habitat conservation areas; (d) frequently flooded areas; and (e) geologically hazardous areas.

RCW 36.70A.170 provides in relevant part:

> (1) On or before September 1, 1991, each county, and each city, shall designate where appropriate:
> . . .
> (d) Critical Areas.

RCW 36.70A.060 provides in relevant part:

> (2) Each county and city shall adopt development regulations that protect critical areas that are required to be designated under RCW 36.70A.170.

2. Discussion and Conclusions re: Legal Issue 5

The Board concludes that because it found, *supra*, that Ordinance No. 03-063 is noncompliant with the agricultural conservation and urban growth area provisions of the GMA, and remanded the Ordinance to the County, it need not and does not reach the question of whether the Ordinance fails to comply with RCW 36.70A.170(1)(d) and RCW 326.70A.060(2).

VIII. REQUESTS FOR INVALIDITY

Petitioners 1000 Friends and Stillaguamish Flood Control District requested that the Board enter a finding of invalidity for Ordinance No. 03-063. 1000 Friends PFR, at 5. Petitioner CTED did not join in the request for Invalidity. The question of whether or not the Board should enter a finding of invalidity for Ordinance No. 03-063 was framed in the PHO as Legal Issue No. 3, which provides:

Does the continued validity of the violations of RCW Title 36.70A (the Growth Management Act) described in Legal Issues 1 and 2 above, substantially interfere with the fulfillment of the goals of the Growth Management Act such that the enactments at issue should be held invalid pursuant to RCW 36.70A.302?

Applicable Law

RCW 36.70A.302 provides:

> (1) A board may determine that part or all of a comprehensive plan or development regulation are invalid if the board:
> (a) Makes a finding of noncompliance and issues an order of remand under RCW 36.70A.300;
> (b) Includes in the final order a determination, supported by findings of fact and conclusions of law, that the continued validity of part or parts of the plan or regulation would substantially interfere with the fulfillment of the goals of this chapter; and
> (c) Specifies in the final order the particular part or parts of the plan or regulation that are determined to be invalid, and the reasons for their invalidity.

(2) A determination of invalidity is prospective in effect and does not extinguish rights that vested under state or local law before receipt of the board's order by the city or county. The determination of invalidity does not apply to a completed development permit application for a project that vested under state or local law before receipt of the board's order by the county or city or to related construction permits for that project.

Findings of Fact and Conclusions of Law

In the Board's discussion of the UGA issues [Legal Issue Nos. 1 and 4] the Board found that the Arlington UGA expansion, as effectuated by Ordinance No. 03-063, did not comply with the requirements of RCW 36.70A.110, .210(1) and .215, and was not guided by RCW 36.70A.020(1), (2) and (8). Further, in the Board's discussion of the Agricultural Lands Issue [Legal Issue No. 2] the Board found that the redesignation of agricultural lands to general commercial, as effectuated by Ordinance No. 03-063, did not comply with the requirements of RCW 36.70A.040, RCW 36.70A.060(1) and RCW 36.70A.170(1)(a) and was not guided by RCW 36.70A.020(2) and (8). The question now becomes whether the continued validity of Ordinance No. 03-063 during the period of remand, would substantially interfere with the fulfillment of the Goals of the Act.

The Board's review of the facts and circumstances involved in the Arlington UGA expansion and loss of properly designated agricultural resource lands, as discussed *supra*, leads the Board to conclude that the continued validity of noncompliant Ordinance No.03-063 will substantially interfere with Goals (1), (2), and (8) of the Act. To permit urban land use activities in Island Crossing would substantially interfere with the fulfillment of Goal 8 because it would not "encourage the conservation of productive agricultural lands" within the portion of Island Crossing presently designated agricultural, nor would it "discourage incompatible uses" adjacent to the agricultural resource lands that surround Island Crossing on all sides. To expand the Arlington UGA in view of the County's admission that its own land capacity policies and inventory show no need for additional commercial land area would not "encourage development in [existing] urban areas" in contravention of Goal 1.

The County's action to convert lands from their proper agricultural designations to urban commercial uses and to include Island Crossing within the UGA flies in the face of Goals, 1, 2, and 8. It would violate the GMA's clear direction that urban growth should be directed to urban areas where services and facilities already exist and that UGAs should not be expanded absent a documented unmet need for additional urban land. Development of Island Crossing under the provisions of Ordinance No. 03-063 would immediately and perpetually impair resource land activities in the agricultural lands that surround it on all sides, ignite real estate expectations and speculation about conversion of those lands to urban designations, hasten future demand for urban level services and infrastructure in the surrounding area, and ultimately erode the long-term viability of the resource lands of the Stillaguamish River Valley. Such an outcome plainly violates the

GMA's "legislative mandate for the conservation of agricultural land." *King County v. Central Puget Sound Growth Management Hearings Board*, 142 Wn.2d 543, 558, 14 P.3d 133 (2000)

Therefore, the Board enters a **Determination of Invalidity with respect to the following portions of** Ordinance No. 03-063:

- The portion that expanded the Arlington urban growth area by 110.5 acres to include the Island Crossing area.
- The portion that replaced the 75.5 acre area of Riverway Commercial Farmland designation with an Urban Commercial designation
- The portion that rezoned the 75.5 acres of A-10 to General Commercial (GC)
- The portion that replaced the 35.5 acre area of Rural Freeway Service with an Urban Commercial designation
- The portion that rezoned the 35.5 acres of Rural Freeway Service (RFS) to General Commercial

IX. ORDER

Having reviewed and considered the above-referenced documents, having considered the arguments of the parties, and having deliberated on the matter, the Board ORDERS:

1. With respect to adoption of Ordinance No. 03-063, the Board issues Snohomish County a **finding of noncompliance** with RCW 36.70A.020(1), (2), (8), and (10) and .040, .060(1), .110, .170(1)(a) and .215.

2. The Board enters a **finding of invalidity** with respect to the following portions of Ordinance No. 03-063:

   - The portion that expanded the Arlington urban growth area by 110.5 acres to include the Island Crossing area.
   - The portion that replaced the 75.5 acre area of Riverway Commercial Farmland designation with an Urban Commercial designation
   - The portion that rezoned the 75.5 acres of A-10 to General Commercial (GC)
   - The portion that replaced the 35.5 acre area of Rural Freeway Service with an Urban Commercial designation
   - The portion that rezoned the 35.5 acres of Rural Freeway Service (RFS) to General Commercial

3. The Board establishes **4:00 p.m.** on **May 24, 2004** as the deadline for Snohomish County to take legislative action to achieve compliance with the goals and requirements of the GMA as interpreted and set forth in this Order.

4. By **Wednesday, June 2, 2004**, at **4:00 p.m.**, or within one week of taking the legislative action described in paragraph 2 above, whichever comes first, the County

shall submit to the Board, with a copy simultaneously served on Petitioners and Intervenor, an original and four copies of its Statement of Actions Taken to Comply (the **SATC**). Attached to the SATC shall be a copy of any legislative action taken in response to this Order.

5. By **Wednesday, June 9, 2004**, at **4:00 p.m.**, the Petitioners and Intervenor shall each submit to the Board, with a copy simultaneously served on opposing counsel, an original and four copies of any Response to the SATC.

6. The Board schedules a **Compliance Hearing** in this matter for **10:00 a.m.** on **Monday, June 14, 2004**. The Compliance Hearing will be held at the Board's offices at 900 Fourth Avenue, Suite 2470, in Seattle, WA. In the event that the County takes legislative action earlier than the date established in paragraph 2 above, it shall so notify the Board, after which the Board will issue a subsequent Order setting the revised date for Compliance Hearing.

So ORDERED this 22nd day of March 2004.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

_____
Bruce C. Laing, FAICP
Board Member

_____
Edward G. McGuire, AICP
Board Member

_____
Joseph W. Tovar, FAICP
Board Member

Note: This order constitutes a final order as specified by RCW 36.70A.300. Any party wishing to file a motion for reconsideration of this final order must do so within ten days of service of this order. WAC 242-02-830(1). Any party wishing to appeal this final order to superior court must do so within thirty days of service of this order. WAC 242-02-898.